NO. 42356-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DATRION ISREAL NEWTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Brian Tollefson

No. 10-1-04310-3

BRIEF OF RESPONDEN

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.

1. Whether the sentencing court properly accepted the defendant's guilty plea to second degree felony murder based on second degree assault where the second-degree felony murder statute is not ambiguous, and even if it were considered to be, the 2003 amendment and its accompanying statement of intent make clear the Legislature's intent for assault to be a predicate felony.

B. STATEMENT OF THE CASE.

1. Procedure

On October 8, 2010, Datrion Isreal Newton, hereinafter referred to as "defendant," was charged by information with first degree murder in count I, first degree assault in count II, and first degree unlawful possession of a firearm in count III. CP 3-5. Counts I and II contained firearm sentence enhancements and all counts alleged the aggravating factor that defendant committed the offense with the intent to cause "any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." CP 3-5.

On June 15, 2011, the State filed an amended information charging one count of second degree felony murder, listing the predicate felony as

second degree assault, and including a firearm sentencing enhancement. CP 11; RP 1.

The defendant entered a plea of guilty to that amended information the same day. CP 14-22; RP 1- 9.

The court then sentenced the defendant to 254 months, plus 60 months for the firearm sentencing enhancement, for a total of 314 months in total confinement, 36 months in community custody, and legal financial obligations totaling $2,600.00. CP 26-38; RP 16.

On July 12, 2011, the defendant filed a timely notice of appeal. CP 39-40. *See* RP 17.

2. Facts

On October 3, 2010, Tacoma police responded to a report of a shooting in the 4500 block of South Union Avenue, where they found Donald McCaney, on the ground, suffering from a serious head wound. CP 1, 6. McCaney was transported by paramedics to a local trauma center, but ultimately died of the gunshot wound to the head. CP 6.

Witnesses at the scene told police that members of two street gangs had been engaging in multiple one-on-one fights. CP 6. According to one witness, one man named Jones pulled out a gun and used it to fire one to two shots into the air. CP 6-7. Witnesses indicated that a second man, later identified as the defendant, pulled a gun and fired five to six shots. CP 6-7. One witness described Newton's shots as being fired at the

witnesses. CP 6-7. Jones told police that the defendant handed his gun off to another person and fled the area after firing the shots. CP 7.

The defendant admitted that he was armed with a .45-caliber handgun, but stated that he assumed the bullet that killed McCaney came from one of the men with whom McCaney was fighting. CP 7. The defendant told police that one of these men was holding a handgun and fired shots at him. CP 7. The defendant stated that he then ran after them and believed that he fired at least one shot into a car parked in the alleyway. CP 7.

Police recovered two bullets from the parked car. CP 7. Washington State Patrol Crime Laboratory ballistics testing determined that the bullet that killed McCaney was not fired from Jones' gun, but that the bullet that killed McCaney and that one of the bullets recovered from the parked car were fired from the same gun. CP 7. Police found no evidence of a third gun having been fired at the scene. CP 7.

On June 15, 2011, the defendant pleaded guilty, apparently pursuant to a plea agreement with the State, to an amended information charging second degree murder with a firearm sentencing enhancement. CP 14-22; RP 1-9. In his statement of defendant on plea of guilty, he stated:

> The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement I do not believe I have committed this crime. However, after review of the evidence with my attorney, I believe there is a substantial likelihood I would be

> convicted of the crime at trial. I am pleading guilty to accept the State's agreement to reduce the charges against me and the favorable sentencing recommendation.

CP 14-22. *See* RP 3, 7.

At the plea hearing, the defendant's attorney indicated that he reviewed "each and every paragraph" of the statement of defendant on plea of guilty with the defendant, including "the elements of the crime which he is pleading guilty to," and that the defendant was making a voluntary, knowing, and intelligent waiver of those important constitutional rights that he's giving up by entering this [guilty plea]." RP 2-4. The defendant also stated that his attorney had read the statement of defendant on plea of guilty form to him and that he had no questions about it. RP 5. The defendant specifically stated that he had no questions as to what the elements of the crime were. RP 5.

After a comprehensive colloquy, the Court found that the defendant "made a knowing, intelligent, and voluntary plea of guilty, understanding the charges pending against him, the consequences of the plea," and found that "there is a factual basis for the plea set forth in the [declaration for] determination of probable cause." RP 9; CP 22. *See* CP 1-2, 6-7.

C. ARGUMENT.

1. THE SENTENCING COURT PROPERLY ACCEPTED THE DEFENDANT'S GUILTY PLEA TO SECOND DEGREE FELONY MURDER BASED ON SECOND DEGREE ASSAULT BECAUSE THE SECOND-DEGREE FELONY MURDER STATUTE IS NOT AMBIGUOUS, AND EVEN IF IT WERE CONSIDERED TO BE, THE 2003 AMENDMENT AND ITS ACCOMPANYING STATEMENT OF INTENT MAKE CLEAR THE LEGISLATURE'S INTENT FOR ASSAULT TO BE A PREDICATE FELONY.

"Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary." ***State v. Codiga***, 162 Wn.2d 912, 921, 175 P.3d 1082 (2008); ***Boykin v. Alabama***, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Although Criminal Rule 4.2 sets forth procedure regarding a court's acceptance of a guilty plea, *see* CrR 4.2(d), it "is not the embodiment of a constitutionally valid plea" and "strict adherence to the rule is 'not a constitutionally mandated procedure." ***Matter of Hilyard***, 39 Wn. App. 723, 727, 695 P.2d 596 (1985). Rather, "[t]he constitutionally required ingredients of a voluntary plea are these: The defendant's awareness that he is waiving his rights (1) to remain silent, (2) to confront his accusers, and (3) to jury trial; (4) his awareness of the essential elements of the offense with which he is charged; and (5) his awareness of the direct consequences of pleading guilty." *Id.* at 727.

With respect to ingredient (5), both the Washington State Supreme Court and federal courts have "distinguished direct from collateral

consequences by 'whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." ***State v. Ross***, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (*citing* ***State v. Barton***, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (*quoting* ***Cuthrell v. Director, Patuxent Inst.,*** 475 F.2d 1364, 1366 (4th Cir.), *cert. denied.*, 414 U.S. 1005, 94 S. Ct. 362, 38 L. Ed. 2d 241 (1973)). *See, e.g.,* ***U.S. v. Amador-Leal***, 276 F.3d 511, 514 (9th Cir. 2002). There is "no due process requirement that the court orally question the defendant to ascertain whether he or she understands the consequences of the plea and the nature of the offense." ***Codiga***, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008) (citing ***In Re Personal Restraint of Keene***, 95 Wn.2d 203, 207, 622 P.2d 360 (1980)). Rather, "[k]nowledge of the direct consequences of the plea can be satisfied by the plea documents ." *Id.* (*citing* ***In re Pers. Restraint of Stoudmire***, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001)).

In the present case, the defendant entered a guilty plea to second-degree felony murder under RCW 9A.32.050, which provides, in relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or
>
> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in

> furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b).

However, the defendant now argues that he "entered a plea to a crime under a statute that did not criminalize his acts... because a fair reading of the relevant statute indicates that the predicate assault and the act of causing death must be **separate**," Brief of Appellant, p. 6-11 (emphasis in original). The defendant is mistaken.

Until the decision in ***In Re Personal Restraint Petition of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. ***State v. Wanrow***, 91 Wn.2d 301, 588 P.2d 1320 (1978); ***State v. Roberts***, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); ***State v. Thompson***, 88 Wn.2d 13, 558 P.2d 202, *appeal dismissed for want of federal question*, 434 U.S. 898 (1977); ***State v. Harris***, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than one of constitutional dimension. *See* ***Thompson***, 88 Wn.2d at 17-18.

Moreover, early Supreme Court cases indicated that the 1975 criminal code revisions, which were effective July 1, 1976, had not

changed the Court's view on whether the assault merger doctrine should be applied to Washington's felony murder statute. ***State v. Thompson***, 88 Wn.2d at 17 ("the statutory context in question here was left unchanged."); ***Wanrow***, 91 Wn.2d at 313 (Hicks, J., concurring) (Legislature did not modify ***Harris*** rule with the new 1976 criminal code). Later decisions likewise applied the ***Harris*** reasoning to the current felony murder statute. ***State v. Crane***, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (*citing* ***Wanrow*** and ***Thompson*** and refusing to reconsider assault merger rule or constitutional challenges to felony murder); ***State v. Leech***, 114 Wn.2d 700, 712, 790 P.2d 160 (1990) (refusing to reconsider Wanrow and constitutional challenges to felony murder rule); ***State v. Johnson***, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979) (recognizing that Harris interpretation applied to new statute because Legislature did not act to overrule it); ***State v. Davis***, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); ***State v. Tamalini***, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

In ***In Re Personal Restraint Petition of Andress***, however, the Court made it clear that the comments it had made in ***Wanrow***, ***Thompson***, and ***Roberts*** were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statute enacted in 1975

somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. ***Andress***, 147 Wn.2d at 609-616. The Court in ***Andress*** interpreted that the legislative addition of the "in furtherance of" language to the felony murder statutes signaled an intent by the legislature to remove assault as a predicate felony from the felony murder rule. *Id.* at 616.

Following the ***Andress*** decision, however, the legislature amended the second degree felony murder statute, effective February 12, 2003, to expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> > (b) He or she commits or attempts to commit any felony, ***including assault***, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added).

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question:

> [W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

Wanrow, 91 Wn.2d at 303.

Thus, whether a felony assault can act as a predicate for felony murder is a question of legislative intent. *See also* ***In Re Personal Restraint Petition of Bowman***, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). The legislature made its intent in amending RCW 9A.32.050 clear by enacting an intent statement; stating, in part:

> ***The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder.*** The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. ***The legislature does not agree with or accept the court's findings of legislative intent in State v. Andress,[sic] Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.***

Laws of 2003, ch. 3, § 1 (emphasis added).

Thus, for crimes committed after February 12, 2003, it is beyond dispute that the legislature intended "that assault *is* included as a predicate

crime under the second degree felony murder statue." ***Bowman***, 162 Wn.2d at 335; Laws of 2003, ch. 3, § 1.

It is equally clear that the Legislature did not agree with the ***Andress*** court's interpretation of its prior intent and sought to nullify the impact of the ***Andress*** decision with the 2003 amendment.

Thus, the defendant's argument, which seeks to interpret the current felony murder statute in accord with the principles stated in the ***Andress*** decision, *see* Brief of Appellant, p. 6-11, ignores the legislative statement of intent. The legislature did not want to incorporate the principles announced in ***Andress***, it wanted to render them moot. The Legislature does not agree with the majority opinion in ***Andress*** that including assault as a predicate felony for felony murder leads to "absurd results." Laws of 2003, ch. 3, § 1. The "legislative branch has the power to define criminal conduct and assign punishment for such conduct," ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (*citing* ***Whalen v. United States***, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)), and the Legislature has made its intent clear that it wants felony assault to function as a predicate offense for the felony murder statue.

Essentially, defendant is now asking this Court to find that the principles articulated in the majority opinion of ***Andress*** should be applied to his conviction despite the fact that his offense date was October 3, 2010, years after the legislative amendments designed to stop the impact of ***Andress*** went into effect. Thus, Defendant asks this Court to hold that

the merger doctrine should be the law in Washington so that the crime of assault cannot be a predicate for felony murder. This is inviting the Court to usurp a legislative function and impose the merger doctrine by judicial fiat. This Court should decline such an invitation to violate the separation of powers and affirm Defendant's conviction.

Indeed, this was precisely the holding of Division 1 of this Court in ***State v. Gordon***, 153 Wn. App. 516, 526-29, 223 P.3d 519 (2009). In ***Gordon,*** a case which also arose from Pierce County Superior Court, the Court rejected virtually the same argument advanced by the defendant here. There, as here, the defendant argued that "under canons... of statutory construction and the rule of lenity, this court should interpret the second degree felony murder statute to allow assault to serve as the predicate felony only where the assault is not also the act that causes the death." ***Gordon***, 153 Wn. App. at 527. *Compare* Brief of Appellant, p. 6-11. However, the Court concluded that

> [t]he [second-degree felony murder] statute is not ambiguous. But, even if we assume the statute was ambiguous and look at the legislative history of the statute as Gordon urges, we see that the res gestae issue is no longer problematic. The reasoning in ***Andress*** concerning res gestae involved statutory construction principles to derive the legislature's intent. ***The 2003 amendment in response to the holding in Andress and its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony.***

Id. at 529 (emphasis added).

This Court should similarly decline this defendant's invitation to usurp a legislative function and impose the merger doctrine by judicial fiat. It should affirm Defendant's conviction.

D. CONCLUSION.

The sentencing court properly accepted the defendant's guilty plea to second degree felony murder based on a predicate of second degree assault because the second-degree felony murder statute is not ambiguous, and even if it were considered to be, the 2003 amendment and its accompanying statement of intent make clear the legislature's intent for assault to be a predicate felony.

Therefore, the defendant's conviction should be affirmed.

DATED: May 3, 2012

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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